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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-436
75-437

JAMES L. BUCKLEY, ET AL., *Appellants*

v.

FRANCIS R. VALEO, ET AL., *Appellees*

On Appeals from the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
and
BRIEF FOR UNITED STATES SENATOR LEE METCALF

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MOTION OF UNITED STATES SENATOR LEE METCALF TO FILE A BRIEF AS AMICUS CURIAE

United States Senator Lee Metcalf respectfully requests leave of this Court to file the accompanying brief *amicus curiae,* which is restricted to an analysis of the public financing provisions contained in the Federal Election Campaign Act of 1971 (Pub. L. 92-225, 86 Stat. 3, Codified in Titles 2, 18, 47, U.S.C.—hereinafter referred to as "the FECA"), the Federal Election Campaign Act Amendments of 1974 (Pub. L. 93-443, 83 Stat. 1263 Codified in Titles 2, 5, 18, 26, and 47, U.S.C.

—hereinafter referred to as "the FECA Amendments") and Subtitle H of the Internal Revenue Code of 1954 (Pub. L. 92-178, 85 Stat. 562 as amended by Pub. L. 93-53, 87 Stat. 138, as amended by the FECA amendments 26 U.S.C. §§ 9001 *et seq.*—hereinafter referred to as "Subtitle H"). Said brief *amicus curiae* supports certain propositions advanced by appellants and also supports at least one position expected to be advanced by appellees. It is filed in accord with Rule 42(2) of the Rules of this Court. Written consent of counsel for all parties, including the written authorization of the Solicitor General, has been obtained and true copies of said letters of consent have been filed with the Clerk of this Court.

The constitutional issues before this Court in the instant action are at the very heart of our democratic process in that they touch upon almost every facet of political participation and expression. Among these issues are certain questions of first impression regarding the procedures by which an individual becomes a candidate for Federal elective office and can solicit or receive public monies for such a candidacy. Movant submits that his legislative, political and practical experience regarding such issues can considerably assist this Court's deliberation in the instant case.

Movant is a United States Senator from the State of Montana and is a citizen of the State of Montana and of the United States and is eligible to vote in elections for the office of President of the United States. He has a long standing personal and legislative interest in public financing procedures for elections which dates back to involvement with the formulation of the Presidential Election Campaign Fund Act of 1966, Pub. L. 89-809, 80 Stat. 1539, and introduction of one of the

first comprehensive public financing proposals for federal elections in the Congress (S. 1390, 90th Cong., 1st Sess.)

Movant took part in this action below by submitting a brief *amicus curiae* and by participating in oral argument through counsel. See *e.g. Buckley* v. *Valeo,* No. 75-1061, U.S.D.C.A., Aug. 15, 1975, Slip Op. at 1505, 1561 and 1605.

While Movant believes and argues that the public financing provisions cited above are unconstitutional, Movant has a special concern that, if this Court so holds, neither the holding nor the Court's language should preclude the Congress from devising and enacting a public financing reform which does not contain the flaws of the challenged statutes.

For the above reasons, this motion to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted,

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October, 1975

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Adamany and Agree, *Political Money: A Strategy for Campaign Financing in America*, (1975) 50, 51

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Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C.L.R. 349 (1973) 19, 43, 45

Gunther, The Supreme Court Review, 1971 Term—Forward *In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1 (1972) 35

Mazmanian, *Third Parties in Presidential Elections* (1974) 35

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BRIEF FOR AMICUS CURIAE UNITED STATES SENATOR LEE METCALF [1]

This brief is filed by United States Senator Lee Metcalf contingent upon the Court's granting the foregoing Motion for Leave to File a Brief Amicus Curiae. His interest is set forth in that Motion.

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[1] Amicus Metcalf has asked leave of this Court to address only the constitutional questions presented with respect to the public financing provisions in the FECA, the FECA Amendments, and Subtitle H.

SUMMARY OF ARGUMENT

Representative democratic government should ensure for all citizens, to the maximum extent feasible, equal access to, and an equal opportunity to participate in, the process by which officials of the government are selected. Public financing of elections is a potentially effective way to achieve this objective. Procedures can be enacted within the bounds of the Constitution to utilize public monies to significantly reduce the disproportionate influence of certain segments of society in the nomination and election of public officials. Such procedures also can constructively assist in the presentation to the electorate of diverse viewpoints.

Although Congress has the authority to provide for public subsidization of Federal election campaigns, elements of the statutes challenged in the instant action substantially abridge certain constitutionally protected rights and freedoms, and therefore should be subjected to strict judicial scrutiny.

Specifically, the public financing provisions of the challenged statutes violate First Amendment rights of freedom of speech and association. Minor parties, new parties, and independent candidates are discriminated against by the inclusion of eligibility and allocation formulae that violate Fifth Amendment due process—equal protection requirements. Less affluent members of society are invidiously denied an equal opportunity to participate in the electoral process. The general election public financing provisions of the challenged statutes give the major parties a permanent monopoly over the presidency by freezing the political status quo. Such unequal intervention by the government runs directly counter to numerous constitutional

safeguards that ensure all citizens a right to equality of opportunity to participate in the political process. These challenged public financing provisions are neither rationally related in fact to the permissible objectives sought by their enactment nor the least restrictive means available to accomplish the reforms sought.

This Court should reverse the courts below and find the challenged public financing provisions unconstitutional.

ARGUMENT

I. CONGRESS HAS AUTHORITY UNDER THE CONSTITUTION TO REGULATE PRESIDENTIAL ELECTIONS AND TO ENACT PUBLIC FINANCING PROCEDURES FOR SUCH ELECTIONS

The history of involvement of the legislative branch and the judicial branch in the area of election law reform and regulation is extensive.[2]

Article I, § 4 of the Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . .

This Court as early as 1880[3] and 1884[4] upheld fed-

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[2] See, *Congressional Digest* (February, 1974), The Question of Federal Financing of National Election Campaigns at 36.

[3] *Ex parte Siebold*, 100 U.S. 371 (1880).

[4] *Ex parte Yarbrough*, 110 U.S. 651 (1884). It is interesting to note that this decision found that a right to protect the election of

eral statutes forbidding corruption, fraud and violence in Congressional elections.

In *Smiley* v. *Holm,* 285 U.S. 355 (1932) this Court considered the scope of Congressional authority under Article I, § 4 with Chief Justice Hughes stating for a unanimous Court that the words "Times, Places and Manner" as found therein are:

> comprehensive words [which] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[5]

The Court in *Smiley* further concluded that Article I, Section 4 gave the Congress "a general supervisory power over the whole subject [of congressional elections]."[6]

The proposition that federal control exists over presidential elections was established by this Court's decision in *Burroughs* v. *United States,* 290 U.S. 534 (1934). This position has been reaffirmed in succeeding decisions. *Oregon* v. *Mitchell,* 400 U.S. 112, 124 (1970).

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federal officials could be sustained as an inherent attribute of sovereignty—at 666-667.

[5] 285 U.S. 355, 366 (1932).

[6] *Id.* 367.

In *United States* v. *Classic,* 313 U.S. 299 (1941), this Court overturned *Newberry* v. *United States,* 256 U.S. 232 (1921),[7] and held that Congress has authority to regulate primaries. An eight-man majority held ". . . the authority of Congress, given by [Art. I] § 4, includes the authority to regulate primaries when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress."[8]

Considerable authority supports the power of Congress to expend public monies for election reform.

Article I, § 8, Cl. 1 of the Constitution states:

> The Congress shall have the Power To lay and Collect Taxes . . . to . . . provide for the . . . general Welfare of the United States.

As found by the Court below, this provision does not restrict Congress to express grants of legislative power found in the Constitution. *Buckley* v. *Valeo* No. 75-1061 U.S. D.C.A., Aug. 15, 1975 Slip Op. 1561. *See* also, *United States* v. *Butler,* 297 U.S. 1, 66 (1936); *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937); and *Helvering* v. *Davis,* 301 U.S. 619 (1937).

Congress has wide ranging authority to determine what expenditures will promote the general welfare. Election reform and control is a permissible objective for expenditures under such authority. *Bullock* v. *Carter,* 405 U.S. 134, 148-149 (1972).[9]

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[7] This Court split four to four on whether Congress had the constitutional power to regulate primaries.

[8] 313 U.S. 299, 317 (1941).

[9] See *Buckley* v. *Valeo,* No. 75-1061 U.S.D.C.A., Aug. 15, 1975 Slip. Op. 1561. See also, *U.S. Civil Service Commission* v. *Natl. Assoc. of Letter Carriers,* 413 U.S. 584 (1973); *Pipefitters Local 562* v. *U.S.,* 407 U.S. 385 (1972); and *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947).

Accordingly, there is considerable precedent for the Congress to regulate not only presidential primary and general elections, but also to initiate public financing reforms.[10]

II. THE PUBLIC FINANCING PROVISIONS INCORPORATED IN THE FECA, THE FECA AMENDMENTS AND SUBTITLE H VIOLATE CERTAIN FUNDAMENTAL CONSTITUTIONAL RIGHTS INCLUDING THE RIGHT TO EQUALITY OF OPPORTUNITY TO PARTICIPATE IN THE ELECTORAL PROCESS

The process by which a democratic government selects its public officials is the very heart of its legitimacy. The judicial branch has assumed a particularly important role in guaranteeing that all citizens have an equal opportunity to participate in the electoral process.

In *Williams* v. *Rhodes* 393 U.S. 23 (1968), this Court specifically recognized that fundamental rights are involved in varied ways in the electoral process and that a strict scrutiny test should be applied to state infringement in this area. This Court in *Rhodes* rejected the state's argument that it had a legitimate interest in limiting the number of parties on the ballot to avoid political fragmentation on the grounds that the challenged statute made it "virtually impossible" for a new or minor party to gain access to the ballot.[11] In invalidating the State of Ohio's ballot access law, the majority held:

> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. 393 U.S. 23, 31 (1968)

[10] Professor Albert J. Rosenthal, in *Campaign Financing and the Constitution*, 9 Harv. J. L. 359 (1972) makes a compelling argument that the commerce clause, Art I, § 8, Cl. 3, and the necessary and proper clause, Art. I, § 8, Cl. 18, may also serve as authority for public financing of elections.

[11] 393 U.S. 23 at 24.

The importance of the strict scrutiny test in the electoral area has been recently reaffirmed in *Kusper* v. *Pontikes,* 414 U.S. 51 (1973), where this Court struck down a State of Illinois statute which prohibited an individual from voting in a primary of a political party if he had voted within the preceding twenty-three months in another party's primary. The majority in *Kusper* recognized that, as in *Rhodes,* the mere showing of a legitimate state interest (the prevention of raiding by parties in *Kusper*) is insufficient if a statutory scheme substantially restricts a voter's freedom of association and ability to participate effectively in the political process.

Application of the strict scrutiny standard in the instant action will clearly show that the challenged statutes should be invalidated.

A. The Primary Election Public Financing Provisions of the Challenged Statutes Invidiously Deny the Less Affluent Members of Society an Equal Opportunity To Participate in the Federal Electoral Process, and Should Be Strictly Scrutinized.

> *[W]e cannot close our eyes to the fact . . . that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election . . . .*[12]

In *Bullock* v. *Carter,* 405 U.S. 134, 144 (1972), this Court, in invalidating a Texas filing fee scheme, held that legislative classifications which deny certain persons an equal opportunity to participate effectively in the political process on the basis of wealth must be

[12] *U.S.* v. *Classic,* 313 U.S. 299, 319 (1941).

"closely scrutinized, and found reasonably necessary to the accomplishment of legitimate state interests in order to pass constitutional muster." Similarly, in *Lubin* v. *Panish,* 415 U.S. 709, 716-18 (1974) this Court in reviewing a filing fee system similar to that reviewed in *Bullock* indicated that legislation which classifies candidates as serious or frivolous solely on the basis of their ability to raise funds invidiously denies certain voters an equal opportunity to elect the candidate of their choice and should be subjected to strict scrutiny.

Amicus Metcalf submits that the primary election provisions of Subtitle H, like the filing fees invalidated in *Bullock* and *Lubin* v. *Panish,* deny the less affluent members of society an equal opportunity to elect the candidate of their choice, and therefore should be subjected to strict judicial scrutiny.

Under this chapter of Subtitle H[13] any individual who seeks nomination for elections to be President and, (a) takes the action necessary under the law of a state to qualify for nomination for election, (b) receives contributions or incurs qualified campaign expenses, or (c) gives consent for any other person to receive contributions or to incur qualified campaign expenses in his or her behalf is defined as a candidate. 26 U.S.C. § 9032(2) (1975 Pam. No. 1).

As noted *infra,* the Secretary of the Treasury is directed to maintain a separate account for presidential primaries. After a determination has been made by the Secretary that there are sufficient funds to cover the requirements of the Presidential Election Campaign Act

[13] Chapter 96, the Presidential Primary Matching Payment Account, Pub. L. 93-443, 88 Stat. 1297, 26 USC § 9031 *et seq.*

(the general presidential election fund),[14] payments are to be made from the matching fund account upon certification of the Federal Election Commission. 26 U.S.C. § 9036 (1975 Pam. No. 1). The Secretary is required to "achieve an equitable distribution" of funds when making payments to candidates of the same party considering "the sequence in which such certifications are received." 26 U.S.C. § 9037(b) (1975 Pam. No. 1) Presumably, therefore, early certification is desirable.[15]

Assuming sufficient funds are available, the federal government will match, dollar for dollar up to $250 per contributor, the funds an eligible candidate raises from private contributions for use in primary campaigns. 26 U.S.C. § 9034. To become eligible for these matching grants, a candidate must raise $5,000 in private contributions in each of 20 states,[16] or a total of $100,000.

[14] Pub. L. 92-178, 85 Stat. 563, as amended by Pub. L. 93-443, 26 U.S.C. §§ 9001 *et seq.*

[15] The amount of discretion given the Secretary of Treasury, undoubtedly a political appointee of a "major" party, to administer the public financing provisions of FECA, the FECA Amendments and Subtitle H is considerable and gives rise to serious constitutional and practical questions regarding the operation of this statutory scheme. For example, how is the Secretary to determine what amount of funds should be set aside for post election payments for new parties? How is the Secretary to allocate funds for primary elections if insufficient monies are accumulated from the income tax return check-offs (26 U.S.C. 6096)?

[16] "As with the geographical distribution requirements in the Presidential Election Campaign Fund Act [Chapter 95] this requirement appears unconstitutional. The requirement that seed money be raised in 20 states is even less rational than the requirement that a candidate be on the ballot in ten states [the requirement in Chapter 95]. Certainly, there is no relationship to ultimate success in the primaries. . . . The statutes would permit a candidate to obtain matching funds if he received the necessary contributions from people in the 20 smallest states while excluding candidates

Id. at § 9033. The total amount of public funds such a qualified candidate can receive is $5 million. 26 U.S.C. § 9034 (1975 Pam. No. 1), and 18 U.S.C. 608(c)(1)(a).

This matching grant system is designed and will operate to grant some candidates substantially greater subsidies than are accorded others. It *prima facie* discriminates against candidates supported by the less affluent segments of the population.

Assume *arguendo* that X and Y are candidates in an early presidential primary, and that in this primary each is permitted to spend $300,000. Assume further that to date candidate X has been able to solicit contributions from 10,000 voters, evenly distributed over 20 states, none of whom can afford to contribute more than $5 to his campaign. Because he has not been able to raise at least $100,000, X would not qualify for matching grants, and would be left with only $50,000 with which to continue his efforts to attract increased voter support.

Assume that Candidate Y, on the other hand, has solicited support from 1,500 voters, evenly distributed

who obtained contributions in the 19 largest states. Nevertheless, balancing the interests, since it is in the area of primaries where the greatest threat to the waste of public funds arises, some geographical restrictions might be appropriate. It is submitted, however, that these restrictions should be keyed to the possibility of ultimate success at the election with reference to the electoral college system. A redrafted statute which contained showing of interest requirements in a number of states determined as a function of a low percentage of electoral college votes (although probably politically unacceptable because of the significance in any such formula of the populated states) would be more appropriate and, more importantly, would more adequately protect the interests of the public purpose without unnecessarily interfering with voters' rights." Schwarz, *Public Financing of Elections: A Constitutional Division of Wealth,* American Bar Association, Special Comm. on Election Reform Publication at 67-68 (1975).

over 20 states, all of whom can afford to contribute $100 to his campaign fund. Under Subtitle H, candidate Y is eligible for matching grants and would be entitled to a $150,000 subsidy. When added to the $150,000 he has received from private contributors, this subsidy would give him the maximum amount he is permitted to spend in the primary, or $300,000.

In short, under the primary election provisions of Subtitle H candidate X, who has more than five times the voter support of candidate Y, would have only 1/6th the amount of funds available to candidate Y solely because of the relative inability of his supporters to contribute. Thus, on the basis of the relative wealth of their supporters, the primary election provisions of Subtitle H will operate to increase candidate Y's chances of winning this early primary, and of ultimately securing the party's nomination, while correspondingly diminishing candidate X's chances.[17]

Amicus Metcalf respectfully submits that it is thus clear that the primary campaign provisions of Subtitle H, like the filing fees invalidated in *Bullock* and *Lubin* v. *Panish,* invidiously discriminate against and *prima facie* deny the less affluent members of this society an equal opportunity to elect the candidate of their choice.[18]

[17] See *infra* at 18-29 for a discussion of the data which indicates that differential allocation of campaign subsidies, whether according to electoral results or pursuant to a matching grant system, denies certain candidates an equal chance of winning, which in turn denies their supporters an equal opportunity to elect the candidate of their choice.

[18] Hypotheticals much more extreme than the above certainly are possible and probable. See n. 19 *infra.*

Further, such a discriminatory matching system as contained in Chapter 96 is *contra* to the equal protection "one man-one vote" principle[19] developed by *Baker* v. *Carr,* 369 U.S. 186 (1962) and its progeny.[20] As noted by this Court "the only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President . . . But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Gray* v. *Sanders,* 372 U.S. 368, 380, 381 (1963).

Amicus Metcalf concedes that the challenged public financing statutes in the instant action only concern the offices of president and vice president and that the electoral process for said offices does involve a somewhat weighted selection process through the operation of the electoral college. Amicus Metcalf does *not,* however, interpret the electoral college provisions (Art. II, § 1 Cls. 1-4) of the Constitution to permit the type of discrimination contained in the challenged statutes for presidential *primary* elections, which are not mentioned anywhere in the Constitution.

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[19] As discussed above, the $250 "triggering mechanism" of Chapter 96 is highly discriminatory. For example an individual only able to contribute $1 to a candidate would be able to generate $1 of potential public funding (assuming the candidate could ever meet the $100,000 threshold of contributions of $250 or less in at least 20 states). An individual able to contribute $250 to a qualified candidate would be able to "trigger" $250 in public money. A disparity factor of 250.

[20] See *e.g. Gray* v. *Sanders,* 372 U.S. 368 (1963), *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969) and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969).

Even if one were to conclude that an analogy could be drawn from the electoral college weighting provisions for presidential general elections and primary elections, Amicus Metcalf submits the type of discrimination evidenced by the challenged statutes is of a higher degree as it affects the *formation* of political parties and the *selection* of candidates. As this Court held in *Williams* v. *Rhodes:*

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. 393 U.S. 23, 31 (1968)

Accordingly, the primary matching fund provisions of Chapter 96 of Subtitle H should be strictly scrutinized and found to be violative of the Constitution.

B. The General Election Public Financing Provisions of the Challenged Statutes Should Be Strictly Scrutinized.

1. The general election public financing provisions of the challenged statutes substantially abridge and unconstitutionally condition the First Amendment right to free and effective political association.

It is well established that the First Amendment guarantees individuals a right to *free* and *effective* association with the political organization or party of their choice. *Kusper* v. *Pontikes,* 414 U.S. 51, 56-57 (1973). This Court has held that the right to associate for the advancement of political ideas ranks "among our most precious freedoms," and consistently has subjected legislation which burdens or inhibits the exercise of that right to strict scrutiny. *Kusper* v. *Pontikes, supra; Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968).

Appellees may attempt to distinguish this line of precedent on the ground that differential allocation of

campaign subsidies does not deprive certain candidates of a place on the ballot, or otherwise deprive their supporters of the opportunity to nominate and vote for the candidate of their choice, but instead simply denies them equal access to certain government benefits. Such argument is insubstantial given that this Court has often held that First Amendment rights are protected from indirect as well as direct abridgement. *Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Speiser* v. *Randall,* 357 U.S. 513 (1958), and *Frost & Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583, 593-94 (1926).

The government may not, absent compelling justification, condition eligibility for benefits in a manner which inhibits the exercise or requires the surrender of the right to free and effective political association. *U.S.* v. *Robel,* 389 U.S. 258 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960). *See American Party of Texas* v. *White,* 415 U.S. 767 (1974) (Denying minor party candidates a place on absentee ballots is sufficient cause to warrant strict scrutiny.)

This Court has recognized:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. *Perry* v. *Sinderman,* 408 U.S. 593, 597 (1972).

Amicus Metcalf submits that the general election provisions of Subtitle H unconstitutionally condition and otherwise impose substantial if indirect burdens

upon the First Amendment right to free and effective political association, and therefore should be subjected to strict judicial scrutiny.

Most significantly, the record establishes that differential funding of major, minor, and new political parties under Subtitle H is indeed *specifically intended* to deter or inhibit the exercise by potential presidential candidates of the right to free and effective political association.

Congressional committee reports indicate clearly that one of the primary purposes of the general election provisions of Subtitle H is to discourage or penalize candidates who prefer, for ideological or other reasons, to affiliate themselves with a minor or new political party rather than a major party. Commenting on the eligibility and allocation formulae relating to general election campaigns contained in Subtitle H, the Senate Rules and Administration Committee asserted that as the result of the operation of these formulae:

> . . . [a]*ll but fringe candidates would have an incentive to seek a major party nomination,* rather than run as a minor party candidate, so as to be eligible for the full level of public assistance in the general election. The bill would thereby have a cohesive effect, encouraging different factions to compete and work out coalitions within the framework of a basic two-party system.
>
> If a candidate's supporters clearly constitute a mere fringe group, with no prospect of appealing to a large mass of voters, then he may choose to run as a minor party candidate. But it is unlikely he would raise many matchable contributions, in the event his party had a primary. And in the general election, he will only be eligible for a grant based on his party's prior voting record. Sen. Rep.

No. 689, 93rd Cong., 2d Sess. at 8 (1974).[21] (Emphasis added)

The fact that Congress specifically intends Subtitle H to inhibit the exercise of the First Amendment right to free and effective political association by discouraging candidates from affiliating with a minor or new political party clearly warrants strict scrutiny of the provisions here in question.

The general election provisions of Subtitle H similarly inhibit the exercise of and unconstitutionally condition the first amendment rights of the *individual supporters* of minor and new party candidates. Under these provisions, unless there is a deficit in the fund from which campaign subsidies are to be drawn, the government provides a major party candidate the *total* amount he is permitted to spend. Thus, persons who support a major party candidate are effectively freed from the burden of contributing to his campaign. Those who support a minor or new party candidate, however, are denied this benefit on the basis of their political affiliations. Such persons must be willing and able to contribute funds for campaign purposes from their private resources in order to ensure that the candidate or political party of their choice enjoys financial support equal to that *the government* accords major party candidates.

Subtitle H denies the candidates and supporters of minor and new political parties equal access to govern-

[21] Although Subtitle H was substantially modified in other respects, the particular general election provisions here in question were not amended following the submission of Senate Report 93-689. Therefore the views expressed in the Report are relevant to the issue of Congressional intent or purpose presented by the instant case.

ment benefits *solely* because of the *particular* "choice" they make in exercising their First Amendment right to free and effective political association. The basis of this difference in treatment is not the number of supporters evidenced by or the relative size of a candidate's party. Subtitle H does not provide for a strict correlation between subsidies awarded and the current level of support a party enjoys.

In conclusion, the eligibility and allocation formulae relating to general elections embodied in Subtitle H are *specifically* intended to discourage or inhibit association with minor and new political parties, and to channel the expression of political ideas through the two major parties. Unless it is assumed that these formulae will not have their intended effect,[22] Subtitle H will force candidates affiliated with, or individuals who wish to support, a minor or new political party either to forego government benefits in order to follow the precepts of their political beliefs, or to abandon those beliefs in order to enjoy the fruits of those benefits. Such persons will be forced *by the federal government* to pay a higher price than the supporters of major party candidates to support effectively the candidate or political party of their choice.[23]

Accordingly, it is clear that the general election provisions of Subtitle H unconstitutionally condition and

[22] It should be noted that in *Speiser* v. *Randall*, 357 U.S. 513 (1958) this Court suggested that the imposition of a condition upon eligibility for government benefits similar to the conditions here in question would "inevitably" inhibit the exercise of First Amendment rights. The Court also emphasized that conditions upon government benefits which operate to inhibit the exercise of First Amendment rights cannot be sustained absent "compelling justification."

[23] See Discussion *infra* at Part II.C.

otherwise substantially inhibit exercise of the First Amendment right to free and effective political association.

2. The general election provisions of Subtitle H deny certain individuals an equal opportunity to elect candidates of their choice.

(a) Subtitle H Denies Minor and New Party Candidates an Equal Opportunity of Winning.

In numerous decisions this Court has held that participation in the electoral process, including exercise of the franchise, association with a political organization or party, and campaign activities designed to build an electoral coalition in support of the candidate of one's choice, is a matter of fundamental importance in our representative form of government. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Reynolds* v. *Sims,* 377 U.S. 533 (1964). See also *Shakman* v. *Democratic Organization of Cook County,* 435 F.2d 267 (7th Cir. 1970) cert. denied 402 U.S. 909 (1971), modified on remand, 356 F. Supp. 1241 (N.D. Ill. 1972). Courts consistently have held that federal or state action which imposes substantial and unequal burdens on persons engaged in such activities must thus be subjected to strict judicial scrutiny. *Kramer* v. *Union Free School Dist.,* 395 U.S. 621 (1969); *Reynolds* v. *Sims, supra.* In particular, courts have been especially diligent in strictly scrutinizing measures which deny certain persons an equal *opportunity* to elect the candidate of their choice (for example, malapportionment schemes and ballot access laws).

Under Subtitle H of Chapter 95 a candidate is defined as an individual who has: (1) been nominated for

election for office of President or Vice President of the United States by a major party, or (2) qualified as a candidate of a political party for election to either office in ten (10) or more states.[24] If the Presidential Election Campaign Fund contains sufficient monies[25] major party candidates are entitled to receive *pre-election* subsidies for use in the general election campaign equal to the total amount they are permitted to spend—$20 million plus periodic adjustments for inflation. 26 U.S.C. §§ 9002(6), 9004(a)(1); 18 U.S.C. 608(c)(1)(B). (1975 Pam. No. 1)

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[24] "As noted, the definition of 'candidate' requires that a candidate of a minor party qualify on the ballot in ten or more states. This requirement would appear constitutional only if the Court tests the statute in the most liberal manner by use of the traditional rational relationship test, treating the legislation as an ameliorative act.

"Even under the traditional test, however, there would not appear to be any rational relationship between the number of states chosen, ten, and the chance of success of the candidate in the election through the electoral college. The Act does not require that the ten states have a significant number of electoral votes. Indeed, the statute would permit a candidate to receive public funding if he were on the ballot in the ten smallest states with a total of 34 electoral votes but exclude a candidate who had obtained ballot position in the nine largest states with a total of 245 electoral votes.

"Moreover, the effect of funding a minor party candidate who had obtained ballot position in ten states would be to further restrict other minor parties and new parties since once funded the minor party could then use the funds to attract voters in other states where fledging parties were attempting to gain recognition. It therefore would appear the geographical distribution requirements are unconstitutional" (footnotes omitted) Schwarz, *supra* n. 16 at 62-63. Also see Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens,* 52 N.C.L.R. 349, 393-394 (1973).

[25] See pp. 25-26 *infra* regarding availability of monies for Subtitle H distribution.

Candidates of minor political parties are entitled to *pre-election* subsidies only in an amount in proportion to their party's vote in the preceding presidential election and the average of the votes received by the major party candidates. 26 U.S.C. §§9002(7), 9004(a)(2). For example, this ratio would be 4:1 if the major parties received an average of forty (40) million votes and the minor party received ten (10) million votes. Thus, if in the next election each major party candidate is eligible for a $20 million subsidy, the minor party's candidate would be entitled to $5 million.

The candidate of a new political party is not eligible for any pre-election subsidization for campaign expenses.

Subtitle H not only accords a major party candidate a $20 million subsidy, but entirely frees the candidate of the need to expend substantial amounts of time, money, manpower, and other resources in fund-raising drives. Major party candidates can thus devote all their resources to the effort to attract voter support. Moreover, the record indicates that the availability of money early in the campaign significantly affects both a candidate's decision whether or not to run, and his ability to launch and sustain a successful campaign. Findings of fact, IIB, ¶¶13, 16.

In contrast, even if they proceed through private fund-raising to make up the difference between their subsidy and that accorded a major party candidate, minor and new party candidates will not have nearly as much money as a major party candidate *for use in attracting votes*. First, the most a minor party candidate can receive under Subtitle H is approximately $13

million.[26] This leaves the candidate $7 million short of the major party entitlement. Moreover, even if the candidate is able to make up that difference, he inevitably will have $4 million less than major party candidates to spend given that, on the average, 40% of the funds raised from private contributions must be used to cover fund-raising expenses. Finding of Fact IIB ¶50. In addition, minor and new party candidates will have to divert a substantial amount of time and energy, and the time and energy of their supporters, from the effort to win votes to the effort to attract contributions. See Findings of Fact III ¶¶13, 16.

The record establishes that the relative availability of money has some effect on the outcome of elections. Finding of Fact I, ¶4. Subtitle H is premised on Congress' judgment that the relative availability of time, manpower, and campaign resources other than money also has some effect on electoral results. See Senate Rep. 93-689 at 6. As demonstrated above, under Subtitle H major party candidates *inevitably* will be able to direct a substantially greater amount of money, time and manpower than minor or new party candidates to the effort to attract voter support as opposed to the effort to raise private contributions.

Defendants below concede that the need to solicit private contributions imposes a "demeaning and time-consuming" burden on presidential candidates. ID Br.

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[26] If the major parties in the preceding election received an average of 38 percent of the vote, and a minor party candidate 24 percent, the minor party candidate in the current election theoretically could receive 24/38 x 20 million dollars or approximately $12.6 million dollars. Therefore "at best" a minor party candidate will have to make up a $7.4 million difference. See p. 23-25 *infra*.

at 36-37. The Court of Appeals also recognized that the solicitation of private funds imposes substantial burdens on presidential candidates.

Finally, it is not likely that legislation designed to tip the scales in favor of major party candidates in order to discourage minor and new party candidacies will leave minor and new party candidates "better off" than they were under a system of private financing. *Cf.* Sen. Rep. 93-689 at 6-8. While Subtitle H may not guarantee a major party candidate electoral success, as intended it does substantially increase his chances of winning, and correspondingly diminishes a minor or new party candidate's chances.

(b) The Substantial Competitive Advantages Subtitle H Affords Major Party Candidates Are Not Offset by Post-Election Subsidies.

A candidate entitled to full pre-election subsidies knows from the start how much he has to spend, and is thus in an excellent position to manage his funds in that manner which best serves his strategic needs. Minor and new party candidates can put the hope of post-election subsidies to use only by borrowing money, and, in order to do so, they must persuade a lender to assume the risk that they might not receive enough votes to entitle them to post-election grants to repay such loans.

Post-election subsidies do not relieve minor and new party candidates or their supporters of the burden of fund raising, or of the need to campaign on issues that will attract money, as opposed to votes. Post-election grants thus clearly will not help a minor or new party candidate take his case to the voters.

In fact minor and new parties may never receive any post-election public funding under Subtitle H.

Section 9004 of the Federal Election Campaign Act provides that minor and new party candidates are entitled to post-election subsidies equal only to the lesser amount of: qualified expenses incurred, less contributions; or $20 million, less contributions received. 26 U.S.C. 9004(b). Additionally, this section mandates that the public monies received can only be used to defray qualified campaign expenses or to repay loans the proceeds of which are used to defray such expenses. 26 U.S.C. 9004(c) (1975 Pam. No. 1).

As Professor Albert J. Rosenthal has noted the reasoning behind post-election subsidies is inescapably reminiscent of "Catch 22".[27] Both major parties and new parties are presented with a choice whether to solicit contributions or rely on public financing. The only risk that the major parties run in relying on public financing is that there will not be enough funds in the public coffers for them to receive their full $20 million. However, for the new party, the choice is really a Hobson's choice. The new party shares the risk that there will not be enough public funds to go around, but also, since the new party only gets public financing after an election on a formula tied to its performance during the election, it must seek private financing if it is to have the funds necessary to get the votes necessary to get the public financing. The "Catch 22" of the post-election financing provisions is that the more private funds the new party obtains in order to get votes in order to get public financing, the less public financing the new party gets.

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[27] Rosenthal, *supra,* in n. 10, at 414.

To illustrate, hypothesize a slightly different set of facts from those stated in note 26 *supra,* i.e., major party X's candidate in the current election receives 50 percent of the vote; major party Y's candidate 26 percent of the vote, giving a major party vote average of 38 percent. New party Z's candidate receives 24 percent of the vote in the election. New party Z's candidate would appear to be entitled upon a cursory glance at Subtitle H to 24/38 x $20 million, or approximately $12.6 million. That amount is not necessarily how much new party Z's candidate receives, however. Assume new party Z's candidate received $10 million in contributions and incurred $15 million in qualified expenditures. Applying Section 9004 new party Z's candidate only receives $5 million [the lesser amount of: qualified expenses incurred ($15 million) minus contributions received $10 million) = $5 million; or the maximum presidential spending level permitted ($20 million) less contributions received ($10 million) = $10 million]. Keep all of the above factors and figures constant, except increase the amount of contributions received by new party Z's candidate to $12 million, and as a result new party Z's candidate receives even less in public monies: $3 million [the lesser amount of: qualified expenses incurred ($15 million) minus contributions received ($12 million) = $3 million; or maximum presidential expenditures ($20 million) minus, contributions received ($12 million) = $8 million.]

Thus, the difference of only two percentage points[28] between major party Y's 26 percent and new party Z's

[28] Amicus Metcalf questions whether the 25 percent threshhold in the statute is based on sound empirical data or is merely an arbitrary figure and not rationally related to any analytical finding by the Congress. Amicus Metcalf notes that a recent Gallup Poll shows that even one of the two "major" parties is now below the 25 per cent figure. American Institute of Public Opinion (The Gallup Poll), "GOP Affiliation Continues to Slide; Independents at Peak," Princeton, N.J.; Sept. 21, 1975.

24 percent means not only anywhere from $17 million to $15 million dollars in public funds prior to the election (major party Y would have received $20 million prior to the election), but also a considerable disadvantage to new party Z's candidate given the hard work and time required to raise contributions even to attract 24 percent of the vote. In fact, as noted above, the harder new party Z's candidate tries to raise pre-election contributions, and is successful, the greater he is penalized with respect to availability of post-election public money.

In addition, Subtitle H confronts new and minor parties with the distinct possibility that even though they might technically qualify for post-election public financing there may be no monies available. After a number of contested presidential primary elections, the Secretary of the Treasury—assuming no new party would receive five percent or more of the vote—may have reserved only enough money, $40 million, for the two major parties. Unless taxpayer participation in the check-off system significantly improves[29] such an election situation will confront a Secretary of the Treasury with many practical allocation problems.[30] And the above hypothetical may become a reality next

[29] Finding of Fact I, ¶ 72, 73, 74. Obtaining Congressional approval to appropriate more money for the fund may be an illusory remedy for new and minor parties given major party control of the Congress.

[30] Such an individual himself will undoubtedly be a political appointee of a major party immediately giving rise to conflict of interest questions.

year given the past level of support for the American Independent Party,[31] the abundance of presidential candidates[32] and the scarcity of funds available for public financing.[33]

The solution to this dilemma for new, and minor party candidates who want to avail themselves of public financing monies for general elections evidently is to go into debt, not concentrate on fund-raising and pray that money is left for post-election disbursement. Such a solution suggests the clear result and effect of this provision of Subtitle H: Foreclosure of public financing for general elections to all but candidates of the existing two major political parties.

(c) By Denying Minor and New Party Candidates an Equal Opportunity of Winning, Subtitle H Denies Certain Individuals an Equal Opportunity to Elect the Candidates of Their Choice.

While a candidate's interest in holding elective office might not be deemed sufficiently fundamental to trigger strict scrutiny of measures which deny him an equal opportunity of winning, this Court has often recognized that governmental action which affects candidates inevitably has a correlative impact on voters.[34] This holds true for Subtitle H. By denying minor and new party candidates an equal opportunity of winning,

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[31] Finding of Fact I, ¶ 85 indicates that Governor Wallace received 13.5 percent of the vote in 1968.

[32] As of September 23rd, 1975, 49 candidates for the presidency had filed with the Federal Election Commission Information Office.

[33] Id. n. 29 *supra.*

[34] *See e.g. Lubin* v. *Panish,* 415 U.S. 709, 716 (1974).

which is demonstrated *supra,* the general election provisions of Subtitle H substantially and invidiously deny their individual supporters an equal opportunity to elect a candidate of their choice.

Assume, *arguendo,* that X, Y, and Z are presidential candidates. X and Y are major party candidates entitled to full public funding, or $20 million. Z is a minor party candidate eligible for 20% of the major party entitlement, or $4 million.

Assume further that at the time these subsidies are distributed each candidate has 1,000 committed supporters, and that the remaining 7,000 of a total of 10,000 eligible voters are undecided. X and Y not only received a substantially larger subsidy than candidate Z, but both X and Y and their supporters have been *entirely* freed of the burden of raising private contributions. Thus, Subtitle H accords the committed supporters of major party candidate X and Y a greater opportunity than the committed supporters of minor party candidate Z to elect the candidate of their choice, and both X and Y clearly will have a better *chance* than Z of attracting enough of the undecided votes to win.

This proposition might also be stated in terms which more closely approximate the approach the courts have tended to take in malapportionment cases. *See e.g., Reynolds* v. *Sims,* 377 U.S. 533 (1957). In the three-party system described above, it is likely that more than one-half the votes eventually cast will be meaningless in the sense that the candidate for whom they are polled will lose. Yet, because minor party candidate Z has been denied an equal chance of winning, there is a higher probability that the votes of his committed supporters will be meaningless than there is that the votes

of X's and Y's committed supporters will be meaningless. Thus, by differentially allocating campaign subsidies, Subtitle H in effect places a higher value on the votes of those who support a major party candidate, and correspondingly dilutes the value of the votes of those who support a minor or new party candidate.

Storer v. *Brown,* 415 U.S. 724 (1974); *American Party of Texas* v. *White,* 415 U.S. 767 (1974), and *Jenness* v. *Fortson,* 403 U.S. 431 (1971), which have been cited by defendants below in support of the assertion that the general election provisions of Subtitle H are not invidiously discriminatory, are readily distinguishable. In those decisions, this Court carefully emphasized that, although it treated minor parties differently, the state did *not* require minor party candidates to bear burdens "inherently greater" than those imposed on major party candidates. As discussed above, the record in this case demonstrates clearly that unlike the measures in question in *Storer, American Party,* and *Jenness,* Subtitle H does require minor and new party candidates to bear burdens "inherently greater" than those imposed on major party candidates in order to attain access to campaign funding, to attract voter support, and to achieve electoral success. This in turn invidiously and substantially denies the individual supporters of minor or new political parties an equal opportunity to elect a candidate of their choice. *Lubin* v. *Panish,* 415 U.S. 709 (1974); *Williams* v. *Rhodes,* 393 U.S. 23 (1968).

It is thus clear that Subtitle H imposes invidious and substantially unequal burdens on the efforts of the supporters of minor or new party candidates to elect the candidate of their choice, and therefore should be subjected to strict judicial scrutiny.

3. The general election public financing provisions of the challenged statutes give two particular parties a permanent monopoly over the Presidency, freeze the political status quo, and otherwise invidiously discriminate against certain discrete and insular minorities.

> *"All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted . . . The absence of such voices would be a symptom of grave illness in our society."* [35]

The record indicates that Subtitle H is *specifically* designed to give two particular parties—the Democratic and Republican—a permanent, as well as immediate electoral advantage, and it is likely to accomplish precisely that result.

If the Subtitle H general election public financing provisions had been in effect throughout our history it is doubtful that the Whig Party would have disappeared between 1852 and 1856, that the Republican Party would have been able to elect Abraham Lincoln in 1860, or that Teddy Roosevelt could have hoped to outpoll President Taft in his Bull Moose candidacy in 1912.[36] Under Subtitle H George Wallace and his American Independent Party would have received nothing in 1968,[37] while John Schmitz, the Party's candidate in 1972, would have received several million

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[35] *Sweezy* v. *New Hampshire,* 354 U.S. 234, 251 (1957).

[36] Finding of Fact I, ¶ 85.

[37] Id.

dollars as a result of his receiving only 1.3 percent of the vote.[38]

In the 1976 presidential race, *only* candidates of the Democratic and Republican parties will be eligible for pre-election public funding, and as major party candidates, they will be entitled to the full subsidization of their campaign expenses. Consequently, and as Congress specifically intends, all but "fringe" candidates will be strongly encouraged to seek either the Democratic or Republican nomination rather than run as a minor party candidate. *See* Sen. Rep. 93-689 at 8. This procedure thus increases the likelihood that the Democratic and Republican parties will field the "strongest" candidates, and by a wide margin outpoll any minor party candidates who do decide to run. The cycle would then be repeated in 1980, and thereafter. Thus, assuming that Subtitle H works the results *Congress intends,* starting in 1976 the Democratic and Republican parties will enjoy an effective and permanent control over presidential elections, and the public financing system to fund such elections.

Whatever disadvantages the candidates and supporters of minor and new political parties have borne under a system of private financing of campaigns have been the result of private decisions. Under Subtitle H, the *government* has taken action which invidiously denies the candidates and supporters of minor and new political parties an opportunity to participate in the electoral process on an equal basis with the candidates and supporters of the major parties.

Decisions previously rendered by this Court document the long history of prejudice against and official efforts to diminish the role of minor political parties,

[38] *See generally* Statistical Abstract of the United States, 1974.

(see *Williams* v. *Rhodes* and its progeny) and recognize that legislators have a substantial interest in and may be naturally inclined to enact measures which tend to ensure that persons of like persuasion will control the office of the President. *See Kramer* v. *Union Free School District,* 395 U.S. 621, 628 (1969). This Court has also recognized that discrete and insular minorities are particularly dependent upon close judicial supervision of governmental action. *See United States* v. *Carolene Prods. Co.,* 304 U.S. 144, 153 n.4 (1938) (dictum).[39]

C. The Tax Check-off System Incorporated in the Challenged Statutes Is Constitutionally Defective and Should Be Strictly Scrutinized.

26 U.S.C. § 6096 establishes presidential election campaign funds to be administered by the Secretary of the Treasury. Every individual, other than a non-resident alien, whose income tax liability for the taxable year is $1 or more may designate that $1 shall be paid into a presidential election campaign fund.[40]

Taxpayers so designating contributions to the fund are not permitted to select a specific political party[41]

[39] "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

[40] In the case of a joint return of a husband and wife having an income tax liability of $2 or more, each spouse may designate that $1 shall be paid to the fund.

[41] *Pub. L. 91-53,* 87 Stat. 138, deleted the following from § 6096, "for the account of the candidates of any specified political party for President and Vice President of the United States, or if no specified account is designated by such individual, for several accounts for all candidates for election to the offices of President and Vice President of the United States."

or candidate to receive their contribution. Monies accumulated through this section are to be dispersed through Chapter 95 of Subtitle H, The Presidential Election Campaign Fund Act, (26 U.S.C. §§ 9001 et seq.), and Chapter 96 of Subtitle H, The Presidential Primary Matching Payment Account Act (26 U.S.C. §§ 9031 et seq.), and for presidential nominating conventions, (26 U.S.C. 9008).

The Court of Appeals stated in its opinion below:

> "The Congress has determined that providing public funding for the three stages of the Presidential selection process would advance the general welfare of the nation by reducing the reliance of Presidential candidates on large contributions, thus reducing their influence on the outcome of elections and on the operations of government. We are in no position to quarrel with that judgment." *Buckley* v. *Valeo,* Slip Op. at 1561.

Amicus Metcalf submits that implicit in the Court of Appeal's acceptance of Congress' determination that public financing of Presidential campaigns advances the general welfare is acceptance of the principle that persons participating in such funding process by means of the voluntary check-off system (26 U.S.C. § 6096) receive a benefit from the government. c.f., *Bullock* v. *Carter,* 405 U.S. 134, 148 (1972). This is of fundamental conceptual and practical importance, because it is basic that the means chosen by the government in making a benefit available cannot be such that the utilization of those means requires the surrender of constitutional rights. *United States* v. *Robel,* 389 U.S. 258 (1967) and *Perry* v. *Sinderman,* 408 U.S. 593 (1972). Notwithstanding this well established constitutional

limitation on governmental action, the Court of Appeals went on to state:

> ". . . Congress can establish a system which gives the taxpayer some choice—in affecting the total amount of public funds to be distributed on the Congressional formula—without going all the way to permit each taxpayer complete authority over the disposition of his dollar of tax obligation. *If the taxpayer wants to avoid any conception that some of 'his' tax money will benefit candidates he does not favor, then he can simply refrain from checking off his dollar for the Fund. Buckley* v. *Valeo,* Slip Op. at 1561-1562 (emphasis added).

Thus, the Court of Appeals recognized that some taxpayers must refrain from accepting the benefit which Congress has conferred on other taxpayers if they wish to exercise their First Amendment rights of free political association. But the Court below appeared to be oblivious to the prohibition against the government's creating a system of benefits that is conditioned upon a taxpayer's needlessly foregoing the exercise of First Amendment rights of free political association. And it is precisely because of such prohibition that the tax check-off system incorporated in 26 U.S.C. § 6096 should be found violative of the Constitution and invalidated.[42]

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[42] See pp. 13-18 *supra* for Amicus Metcalf's argument on the First Amendment right to effective political association.

III. THE PUBLIC FINANCING PROVISIONS INCORPORATED IN THE FECA, THE FECA AMENDMENTS, AND SUBTITLE H ARE NOT RATIONALLY RELATED TO, OR THE LEAST RESTRICTIVE MEANS OF ACHIEVING, THE PERMISSIBLE OBJECTIVES SOUGHT BY THEIR ENACTMENT.

A. The Public Financing Eligibility and Allocation Formulae Contained in the Challenged Statutes Are Not Rationally Related in Fact to the Permissible Objectives Sought by Their Enactment.

The pertinent legislative history indicates: 1) that the primary purpose of public financing of federal campaigns is to equalize opportunities for effective participation in the political process by minimizing the importance of personal wealth as a determinant of who becomes a candidate, who wins elections, and who enjoys access to elected officials; (*See* H.R. Rep. No. 1239, 93d Cong., 2d Sess. (1974) at 13-14); and 2) that the primary purpose of the particular eligibility and allocation formulae here in question is to identify and provide assistance to candidates with potential for attracting a "significant" level of voter support without subsidizing or encouraging "frivolous candidacies". *See* H.R. Rep. No. 1239 at 13. *See also* Sen. Rep. No. 689, 93d Cong., 2nd Sess. at 6-8. In addition, the record indicates that the general election and convention provisions of Subtitle H are intended to ensure the Democratic and Republican parties a permanent monopoly over the presidency, and to otherwise freeze the political status quo, by inhibiting affiliation with minor and new political parties. *See* discussion *supra* at 29-31.

Amicus Metcalf submits that, while the government has a permissible and indeed compelling interest in ensuring individuals an equal opportunity for effective participation in the electoral process and in preventing the subsidization or proliferation of frivolous candidacies, it is impermissible for the government to attempt to inhibit affiliation with minor or new political parties and to attempt to give two particular parties an effective monopoly over the presidency, *Williams* v. *Rhodes,* 393 U.S. 23, 32 (1968) or to otherwise attempt to freeze the political status quo. *Jenness* v. *Fortson,* 403 U.S. 431 (1971).

Accordingly, the issue presented in testing the differential funding provisions of Subtitle H against the "rational basis in fact" test [43] is whether defendants

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[43] Appellees may question whether the court should apply the traditional minimal rationality standard, or the more recently developed rational basis in fact test. However, it seems now generally agreed that the rational basis in fact approach is, for the majority of equal protection cases, the preferable analytical technique, see e.g., Gunther, The Supreme Court Review—1971 Term —*Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection,* 86 Harv. L. Rev. 1 (1972) and recent cases suggest that this Court is committed to an effort to apply this new standard in lieu of minimal rationality wherever feasible. *See e.g., James* v. *Strange,* 407 U.S. 128 (1972); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972).

Amicus Metcalf submits that the rational basis in fact test can and should be applied when testing the constitutionality of the classifications here at issue. It has been suggested that difficulties may arise in applying this "heightened rationality" standard where alleged differences between persons within and without the classification are subtle and not especially susceptible to empirical proof, or where the classification is experimental or otherwise of a character such that data as to possible differences among the various classes established will not become available unless the statute is allowed some period of operation. Gunther, *supra* at 47-48. But, while public campaign finance legislation is experimental, a great deal of data regarding the character of major, minor and new political parties; of candidates able to solicit private contributions as opposed to those who cannot; and of the probable effect of providing certain candidates more money than others, is presently available. *See e.g.,* Mazmanian, *Third Parties in Presidential*

have shown that those provisions are *in fact* rationally related to the government's legitimate interest in 1) ensuring equality of opportunity in the electoral process, and 2) identifying and providing assistance to candidates with potential for attracting a "significant" level of voter support without subsidizing or encouraging frivolous candidacies.

Amicus Metcalf submits that defendants below failed to meet this requirement, that the record *affirmatively* indicates that there is no rational basis in fact for the differential funding provisions here in issue, and that therefore each of those provisions should be invalidated.

1. *Presidential Primary Matching Fund Account*

In *Bullock* v. *Carter,* 405 U.S. 134 (1974), and again in *Lubin* v. *Panish,* 415 U.S. 709 (1974), this Court invalidated state imposed filing fee requirements on the grounds that a candidate's access to private funds, in and of itself, is not a certain test of whether his candidacy is serious or spurious. Under the primary campaign provisions of Subtitle H, a candidate's ability to raise private contributions is the sole determinant of both his eligibility for campaign subsidies, and the size of the grant he will be awarded should he qualify at all.

Elections, (1974); Adamany, *Financing Politics,* (1969). See also Hearings on S. 1103, S. 1954, S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93d Cong. 1st Sess. (Sept. 1973). Moreover, this data is sufficiently refined and pertinent to allow this Court to make the type of judgments required to determine the extent to which the eligibility and allocation formulae contained in Subtitle H do or do not promote the actual and permissible purposes of the challenged statutes.

Defendants below failed to prove that the matching grant system established by Subtitle H provides any more rational a test of a candidate's seriousness than the filing fees invalidated in *Bullock* and in *Lubin.*[44] In fact, the sole argument defendants below make on this point is that the amount a candidate can raise from private contributions is an objective measure of his support among the electorate. ID Br. 173.

This argument is clearly without merit. Indeed, it was expressly rejected in *Bullock* and in *Lubin.*

In addition, the record in this case affirmatively establishes that there is no rational basis in fact for the primary matching fund provisions of Subtitle H. Matching grants will often *increase* the disparity between the funds available to a candidate supported by the well-to-do and a candidate supported by the less affluent members of the society, even if the latter has a substantially greater number of supporters. *See* discussion *supra* at 10-12.

Such a result is hardly consistent with either the general purposes of public campaign financing, or the more particular purpose of providing assistance to serious candidates without subsidizing or encouraging frivolous candidacies. Indeed, the matching grant approach seems only to compound the inequities campaign subsidies ostensibly are intended to overcome.

It is clear that the primary campaign provisions of Subtitle H fail to satisfy the rational basis in fact requirement, and accordingly should be invalidated.

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[44] Although the "strict scrutiny test" may have provided the basis for decision in both of these cases, they are controlling here to the extent that they hold that a state may not classify a candidate as serious or frivolous solely on the basis of his ability to raise funds, or the ability of his supporters to contribute.

2. *The Presidential Election Campaign Fund Act*

With respect to the general election public financing provisions of Subtitle H, defendants below have argued:

> 1) That Subtitle H ensures "that insubstantial candidates do not receive the same amounts of federal campaign assistance as significant candidates." ID Br. at 155;
>
> 2) That each major party "is a vehicle for political expression by a sizable proportion of the population and attempts to appeal to a majority of the electorate." ID Br. at 158-9; and
>
> 3) That recent decisions establish that the government need not "finance the efforts of every nascent political group seeking to organize itself and *unsuccessfully* attempting to win a place on the general election ballot." IDR Br. at 60, citing *American Party of Texas* v. *White,* 412 U.S. 767, 793-94 (1974) (emphasis added).

Except as applicable to *new* political parties, these arguments fail to establish a rational basis in fact for the general election provision of Subtitle H.[45]

Most significantly, defendants below have failed to prove that with respect to the permissible purposes of public campaign financing *minor* party candidates are either "insubstantial," or "less substantial" than ma-

[45] Amicus Metcalf concedes that the case law indicates that Congress is not *constitutionally* required to provide campaign subsidies to candidates of parties that fail to evidence a "substantial modicum of support of the electorate." *Jenness* v. *Fortson,* 403 U.S. 431 (1971). He further believes, however, that Congress is constitutionally required to provide candidates alternative means—e.g. current petition support as well as past electoral support—of demonstrating they do indeed enjoy a specified level of support. See *Lubin* v. *Panish,* 415 U.S. 709 (1974).

jor party candidates. In particular, defendants below failed even to attempt to prove that a *minor* party [which Subtitle H defines as a party whose candidate in the preceding election received between five (5) and twenty-five (25) percent of the total vote, 26 U.S.C. § 9002(f)] does *not* provide a vehicle for political expression by a sizable proportion of the population and does *not* attempt to appeal to a majority of the electorate.

The Court of Appeals expressly stated in upholding the applicability of disclosure laws to minor parties that "no election law should ever be premised on the notion that non-major parties *cannot* win an election." *Buckley* v. *Valeo* Slip Op. at 1546, n. 114. Surely, then, it is impermissible to presume that minor party candidates do not attempt to "appeal to a majority of the electorate." Indeed, the fact that minor parties are treated exactly like major parties with respect to disclosure laws, but are denied equal access to campaign subsidies, further indicates the invidious character and purpose not only of the particular differential funding provisions here at issue, but of the general regulatory scheme of which those provisions form a part.

Moreover, the "modicum of support" test announced in *Jenness* reflects this Court's determination that the candidate of a party which evidences the support of at least five (5) percent of the electorate does provide a vehicle for political expression for a substantial portion of the electorate, does seek to appeal to a majority of the electorate, and therefore *is* a "serious and substantial" candidate. Significantly, this Court consistently has held that while candidates who evidence a modicum of support may be treated *differently* than major party candidates, they may not be treated *unequally. See e.g. American Party of Texas* v. *White,*

supra. (Candidates of parties that evidence sufficient support to qualify for the ballot are entitled to treatment equal to that accorded major party candidates with respect to absentee balloting.) *See* also *Jenness* v. *Fortson, supra*. (Differential treatment with respect to ballot access of parties evidencing a modicum of support was upheld because it was not shown to be tantamount to inherently *unequal* treatment.)

The record and the pertinent decisions of this Court indicate that minor party candidates seek and have the capacity to attract support from a majority of the electorate, and may therefore not be deemed frivolous. *Buckley* v. *Valeo* Slip Op. at 1546, n. 114. Accordingly, neither of the permissible purposes of the legislation here in question is served by denying minor party candidates access to campaign subsidies equal to those accorded major party candidates.[46] There is no rational basis in fact for such treatment, and therefore said provisions should be invalidated.

3. *Presidential Nominating Convention Financing*

Section 9008 of Subtitle H (Chapter 95, 26 U.S.C. § 9008) establishes an account for monies received from the Presidential Election Campaign Fund Act (26 U.S.C. § 6096) for Presidential nominating conventions. Disbursements from this account are authorized to defray lawful expenses up to $2 million for the nominating conventions of major parties. Minor parties are entitled to a proportional amount computed in the same

[46] Amicus Metcalf does not submit that a major and a minor party candidate must be granted exactly the same amount, but rather that each (and, correlatively, the individual supporters of each) is entitled to an *equal opportunity* to secure campaign subsidies. See discussion *supra* at 18-29.

manner as payments are computed for minor party presidential candidates during the post primary-convention period.

Precluded from receiving any monies for Presidential nominating conventions are all parties (new parties) which did not receive five (5) percent of the total vote cast at the last election, independent candidates and all parties which do not have a national convention. 26 U.S.C. § 9008(b)(2). Section 9008(a) specifically requires the Secretary of the Treasury to create "a separate account for the national committee of each *major party*" (emphasis added).

The rationale for establishing public financing for nominating conventions evidently is based on the "influence or potential influence of big money . . . in all phases of presidential elections," since "major political parties have come to rely heavily on large corporations and labor unions to pay for advertisements in convention programs to meet the expenses of nominating conventions." H.R. Rep. 93-1239 at 14. Defendants below cite *American Party of Texas* v. *White*, 414 U.S. 767 (1974) in support of selective funding for such nominating conventions. ID Br. at 170-172.

Amicus Metcalf contends that defendant's below fail to establish a rational basis in the record of this action to support the above findings. In fact, the record below compels the conclusion that public financing of nominating conventions is not rationally related to election law reform.

Findings of fact I ¶ 76, ¶ 77, ¶ 78, and ¶ 79 respectively state:

> Nomination by a national convention of a political party is neither a constitutional nor a legal

requirement for an individual to be a candidate for election as President of the United States. Not all candidates for President of the United States are nominated by a national nominating convention. (¶76)

Some national nominating conventions have far fewer major or controversial issues to resolve than others. (¶77)

Some national conventions are more costly than others. (¶78)

Public funding of national nominating conventions does not relieve individual candidates for federal offices of reliance on private financing. (¶79)

The purpose and effect of the public financing of nominating conventions is to grant an additional subsidy to the political parties which use national nominating conventions (i.e., the two major political parties).

Reliance upon *American Party of Texas* v. *White* is misplaced. That case did not involve convention expenses as such, but rather the cost of holding an election—ballot counting, ballot machines, etc. As stated by plaintiff's reply brief, below, "financing the mechanics of election day activities is obviously far different from financing political conventions (which the Texas statute did not do for any parties), which are often little more than exercises in political publicity, particularly when the renomination of an incumbent President is involved." PR Br. at 67.

B. Laws Less Restrictive Than the Public Financing Provisions Contained in the Challenged Statutes Would Accomplish the Reforms Sought To Be Achieved by the Congress

> *"[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of the less drastic means for achieving the same basic purpose."* [47]

Preventing public financing procedures (and campaign reform plans in general) from infringing upon competing constitutional freedoms and restraints is a most difficult objective to achieve. Any public financing plan must be continually aware of the hazards involved in achieving such an objective while, at the same time, responding to two very important criteria—eligibility determination and subsidy or benefit distribution.[48]

The way in which the government intervenes in the political process is particularly troubling, because it is difficult to keep intervention from becoming inextricably intertwined with certain parties or candidates and thus infringing upon the rights of freedom of speech and association of others.

As demonstrated above, each of the eligibility and allocation formulae in Subtitle H invidiously denies certain voters an equal opportunity to elect the candidate of their choice. In addition, the general election

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[47] *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (footnote omitted).

[48] See for e.g., Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L.R. 900 (1971); Fleishman, *supra* n. 24, and Rosenthal, *supra* n. 10.

provisions of Subtitle H substantially inhibit exercise of the First Admendment right to free and effective political association. Accordingly, whether on equal protection[49] or First Amendment grounds, each of the provisions here in question should be subjected to strict judicial scrutiny.[50]

Classifications subject to strict scrutiny generally are invalidated if their defenders fail to prove that the classification represents the least discriminatory method of effectively promoting the permissible purposes of the legislation. *See e.g., Lubin* v. *Panish,* 415 U.S. 709

[49] In numerous cases this Court has indicated that the due process clause of the Fifth Amendment guarantees equal protection of the laws on the federal level, and incorporates the analytical techniques and standards of review developed under the Fourteenth Amendment. *See, e.g., United States Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Schneider* v. *Rusk,* 377 U.S. 163 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). *See also Shapiro* v. *Thompson,* 394 U.S. 618 ((1969).

[50] This Court has suggested that if it is established 1) that the purposes of the statute in question are benign or remedial, and 2) that the statute operates to enhance rather than abridge the enjoyment of personal rights, then a court may apply a rational basis standard of review even though as a general matter strict scrutiny would be appropriate. See *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966). By its own terms, this "remedial purposes exception" is applicable only when strict scrutiny would otherwise be based on a suspect classification theory. It cannot be triggered when strict scrutiny is based on the theory that the denial of equal treatment denies constitutionally protected rights—the rule requires both that the purposes of the legislation be remedial, *and* that the denial of equal treatment enhance rather than abridge the enjoyment of personal rights. As demonstrated *supra,* although the ostensible purpose of public campaign finance legislation is to promote equality of political opportunity, the particular eligibility and allocation formulae here in question will operate with respect to certain persons to abridge rather than enhance the enjoyment of personal rights. Therefore, these formulae do not fall within the remedial purposes exception.

(1974); *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969). In addition, proponents of the "sliding scale" approach to equal protection analysis—whereby the strictness of the standards against which a challenged classification is tested varies according to the "facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification"—seem inclined where important individual rights or interests are at stake to require the government to establish at the least that there is no method of effectively promoting the permissible purposes of the legislation that would be less discriminatory than the method under review. *See Storer* v. *Brown,* 415 U.S. 724, 756-57 (Brennan, J., dissenting).[51]

As stated by Professor Joel L. Fleishman in a recent article reviewing public financing alternatives, the Courts in assessing First Amendment infringements "would weigh the means chosen against all other reasonably available means in order to be certain that it is the least onerous alternative."[52]

This Court has emphasized that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amend-

[51] This Court has considered specific statutory alternatives in striking down statutory provisions that infringe upon constitutionally protected rights. *Martin* v. *City of Struthers,* 319 U.S. 141, 147, 148 (1943). *See also O'Brien* v. *Skinner,* 414 U.S. 524, 534 (1974) (Marshall, J., concurring).

[52] Fleishman, n. 10 *supra* at 413. Also see *United States* v. *Robel,* 389 U.S. 258, 267-268 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), and Note, *The Less Restrictive Alternative in Constitutional Adjudication; An Analysis, a Justification and Some Criteria.* 27 Vand. L.R. 971 (1974).

ment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has given way to other compelling needs of society." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-612 (1973).[53]

Amicus Metcalf submits that the challenged public financing statutes do significantly infringe upon certain fundamental First and Fifth Amendment protected freedoms and that defendants below have failed to prove that the eligibility and allocation provisions of Subtitle H represent the least discriminatory method of effectively promoting the permissible objectives of the enactments. Further, Amicus Metcalf contends that the record affirmatively establishes that several alternative approaches would more effectively promote the permissible objectives of the statutes in a *substantially* less discriminatory manner.

The efforts of defendants below to establish that the differential funding provisions of Subtitle H represent the least discriminatory methods of effectively promoting the permissible purposes of the legislation are limited to the fourfold assertion that a voucher approach to public campaign financing is undesirable. They assert such a procedure:

(1) "could" increase the power of groups able to collect vouchers quickly and efficiently;

(2) "could" lead such groups to use coercion to aggregate their voucher strength;

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[53] See *Roe* v. *Wade,* 410 U.S. 113 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) and *Talley* v. *California,* 362 U.S. 60 (1960). See also *Dreas* v. *Myers,* 535 P.2d 541 (Ore. Sup. Ct. 1975) where the State of Oregon's campaign financing laws was found to be unconstitutional based on the less restrictive alternative test.

(3) "might" lead to the development of a black market in vouchers; and

(4) provides no assurance that a candidate will receive voucher funds in time to conduct a meaningful campaign. ID R at 60-65.

These arguments are without merit. The first three are not only highly speculative, but could easily be averted by provisions in voucher legislation for harsh criminal penalties for such conduct. With regard to the fourth assertion it suffices to say that a candidate's decision to seek vouchers late rather than early in the campaign would be to a significant extent a function of a candidate's strategy—which presumably is a matter over which the candidate enjoys some control. In any case, surely a voucher plan gives a candidate *more* control over when campaign subsidies are allocated than the post-election grant provision of Subtitle H.

Defendants below clearly have failed to prove that Subtitle H represents the least discriminatory method of effectuating the permissible purposes of the legislation. For this reason alone the provisions here at issue should be invalidated. See *Storer* v. *Brown,* 415 U.S. 724, 760-61 (Brennan J., dissenting) (1974).

It is not difficult to demonstrate that Congress can select from among several procedures for allocating campaign subsidies which would promote the permissible purposes of the legislation *more* effectively than Subtitle H, and in a *significantly* less discriminatory manner.

One less onerous alternative that would accomplish campaign financing reform objectives without infring-

ing upon protected Constitutional rights is a voucher plan introduced by Amicus Metcalf in the Congress,[54] which was noted by the majority and in the dissenting opinions of the courts below. *Buckley* v. *Valeo*. Slip Op. at 1505 and 1561. Under this plan all taxpayers who checked the appropriate box on their income tax forms would receive political campaign contribution vouchers. A box designated for "congressional elections" would appear on the tax forms every year; a separate "Presidential election" check-off box would appear only in the two years preceding presidential election years.

Prior to each non-presidential election year, each taxpayer would have been sent two vouchers designated for use in congressional races, one of which would have been received in time for use in the primaries if the taxpayer so desired. Otherwise, he or she would be permitted to use both vouchers in the general election.

Prior to each Presidential election year, in addition to the congressional vouchers, the taxpayer would have been sent two vouchers designated for use in the presidential race. Again, one of these would have been received in time for use in the primaries but would remain available for use in the general election if the taxpayer so desired.

To avoid abuses, however, these vouchers could not be carried over from election to election; they would become invalid after the date of the general election every two years. Further, criminal penalties are provided for any person who sells, offers to sell, or purchase vouchers.

[54] S. 1760, 94th Congress, 1st Sess., Cong. Rec. (daily ed) S-8445-8448.

Each voucher would be redeemable for one dollar when presented to the Department of the Treasury, pursuant to regulations issued by the Federal Election Commission. Qualified candidates, political committees, and parties would be eligible to receive vouchers. The vouchers would have no value for anyone else, or for any taxpayer who neglected or decided not to use them. The Congress would appropriate sufficient funds to cover the number of vouchers requested annually, and the amount not redeemed by the end of each biennial campaign would revert to the Treasury.

Such a public financing system would not necessitate an artifical or discriminatory funding formula. Greater individual participation and interest in election campaigns would be fostered. Vouchers would be available to and could be redeemed by any candidate who has a "modicum of support." Therefore, public financing would be provided "serious" candidates, based on their current level of support. But the voucher system would not operate either to encourage frivolous candidacies by those with little support or to provide continuing support for candidacies by those who, while enjoying substantial support in a prior election, no longer command significant support.

Further, placing the ultimate decision with the public as to the share of public funds each party or candidate would receive would eliminate the danger of partisan political manipulation of such public funds. Finally, since each individual would be accorded control over the same value of vouchers, which he would make available to the candidate or party of his choice, such a system would not discriminate against an indi-

vidual's right to an equal opportunity to participate to the political process, nor abridge in any manner the right of a citizen to free and effective political association.

Another less restrictive alternative with elements of the voucher system has recently been recommended by David Adamany and George Agree. Based on an extensive analysis of campaign financing conducted for the 20th Century Fund,[55] the Adamany-Agree proposal would establish a mixed voucher-flat grant program. Their proposed procedure is similar in some respects to Amicus Metcalf's voucher plan discussed *supra,* and would provide for public financing of both Presidential and Congressional candidates as well as a system of direct grants to political parties.

A third type of less restrictive alternative contains a petition option procedure under which a candidate would be able to obtain public financing by either qualifying on the basis of a past election percentage factor, or submitting petitions bearing a specified percentage of eligible voters.[56]

These and other less restrictive alternatives to the challenged statutes have been widely discussed, and have received substantial support among public officials and constitutional scholars.[57]

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[55] Adamany and Agree. *Political Money: The Strategy for Campaign Financing in America* (1975) Chapter 11.

[56] See S. 1954, 93rd Cong. 1st Sess., introduced by Senators Stevenson of Illinois and Mathias of Maryland.

[57] See Adamany and Agree, *supra,* n. 55 at Chapter 10. Also see 61 Am. Bar Assoc. J. 1085 (August, 1975) Report of the American Bar Association Special Committee on Election Reform, adopted August, 1975 by the House of Delegates of the American Bar Association.

Undoubtedly the area of campaign reform presents difficult problems, but these are not so complex[58] that they foreclose the above mentioned alternatives. Indeed, some of the alternatives noted herein would be a far more practical way—in the sense of efficiency and convenience—of achieving electoral reform than the challenged statutes. Certainly the voucher procedure would eliminate the practical problems confronting a Secretary of the Treasury in administering and distributing public financing, problems which will be compounded if public receptivity to the tax check off system as presently structured remains relatively low.

This Court in the past has recognized that valid alternatives to accomplish a permissible objective should be considered in scrutinizing a constitutionally flawed statute. Indeed, "if a solution exists that is equally solicitous of the state's interest . . . but is more solicitous of individual interests, a court certainly should not be precluded from protecting the individual."[59]

Clearly less restrictive alternatives exist for public financing of elections. The less restrictive means test should be invoked in this case to preserve equality of opportunity to participate in the political process—surely one of the most fundamental rights of the citizen[60]—and, accordingly, the public financing provisions of the challenged statutes should be found to be constitutionally defective.

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[58] Id. c.f. *San Antonio Indep. Sch. Dist.* v. *Rodriguz,* 411 U.S. 1, 41 (1973).

[59] 27 Vand. L.R. 971 (1974) *supra* n. 52 at 1022.

[60] In fact, such a right is a combination of many protections under the First, Fifth, and Fourteenth Amendments and, taken together, are the essential guarantors of political freedom in our representative system of government.

CONCLUSION

Amicus Metcalf respectfully submits for the reasons herein stated that the public financing provisions of the FECA, FECA Amendments and Subtitle H should be found to be violative of the Constitution and that the decisions of the Courts below upholding said statutes should be reversed.

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